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IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR.

Criminal Appeal No. 438 /2001.

APPELLANT (IN JAIL) : Ramnarayan s/o Pancham, aged about 28 years, r/o Village Jatasemar, P.S. Baikunthpur, Distt. Koria, C.G.

V E R S U S.

RESPONDENT : The State of Chhattisgarh through P.S. Baikunthpur, Distt. Koria, C.G.

CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE.

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(19)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.438/2001

Ramnarayan

Vs.

State of Chhattisgarh

Post for Orders : 24 .07.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

(21)
(19)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 438/2001

RAMNARAYAN

Vs.

STATE OF CHHATTISGARH

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Present: -

Shri A.K.Prasad, learned counsel for the appellant.
Shri Ashish Shukla, Govt. Advocate/Additional Public Prosecutor for the State.

JUDGMENT
(Delivered on 24-07-2006)

This appeal is directed against the judgment dated 25-04-2001 passed by Shri T.P.Sharma, 1st Additional Sessions Judge, Baikunthpur, District-Korea in Sessions Trial No.19/1999 whereby the appellant was convicted under Section-363 of the I.P.C. and was sentenced to undergo rigorous imprisonment for 3 years.

2. Briefly stated the prosecution story is that on 01-06-1995 Shashikala PW-1 aged about 14 years had gone to pluck mangoes in the outskirts of the Village-Jatasamer along with Kailaso Bai. The appellant came there with Bhola and threatened the prosecutrix with a *Tangia* to go with Bhola. Knowing full well that the prosecutrix would be subjected to illicit intercourse by Bhola, the appellant is alleged to have assisted Bhola in kidnapping the prosecutrix by taking her upto Chatidand Forest with Bhola. Frightened, Kailaso Bai returned home and narrated the incident to Darbari PW-2, father of the prosecutrix. After finding the prosecutrix in Village-Jatasamer, report was lodged by Darbari PW-2 at

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Police Station-Baikunthpur after 22 days on 22-06-1995. School leaving certificate Ex.P-6 showing date of birth of the prosecutrix to be 01-03-1981 was recovered from Gendlal PW-3. The appellant was prosecuted along with Bhola and one Tilak Ram for the offences under Sections-363, 366, 376, 506-B read with Section-34 of IPC. It was alleged by the prosecution that Bhola committed rape on the prosecutrix during her stay with him at Village-Jatasamer. It was further alleged by the prosecution that one Tilak Ram had threatened the prosecutrix during her stay with Bhola.

3. All three accused persons were shown as absconding at the time of filing of the challan. Appellant Ramnarayana was arrested on 08-10-1999 and faced the trial while co-accused Bhola and Tilak remained absconding. Para-5 of the impugned judgment shows that accused Tilak had expired. Appellant Ramnarayan was charged under Section-363 & 366 of the IPC. The appellant abjured the guilt. The prosecution examined as many as 9 witnesses. The appellant examined Lalla Ram DW-1 and Bandhan DW-2 in his defence. Relying upon the evidence led by the prosecution, learned trial Judge convicted and sentenced the appellant as aforesaid in para-1 (supra).

4. Shri A.K.Prasad, learned counsel for the appellant has assailed the conviction of the appellant under Section-363 of IPC on the ground that Kailaso Bai was neither cited nor examined by the prosecution as a witness due to which an adverse inference should have been drawn against the prosecution. No positive proof relating to age of the prosecutrix was furnished by the prosecution. In the absence of ossification test for proof of age of the prosecutrix, it could not be ruled out that the prosecutrix was aged 18 years or more on the date of occurrence. Para-5 of the testimony of Shivbalak PW-7 was also referred to while arguing

that the appellant was falsely implicated by the father of the prosecutrix due to previous animosity. Lastly, it was contended that the delay in lodging the F.I.R. was not satisfactorily explained. On the other hand, Shri Ashish Shukla, learned Govt. Advocate for the State argued in support of the impugned judgment.

5. Having heard rival submissions, I have perused the record. The testimony of the prosecutrix clearly goes to show that she had gone to eat mangoes with Kailaso Bai at 12 Noon. Thus, Kailaso Bai was present when the appellant is alleged to have kidnapped the prosecutrix under threats with a *Tangia*. According to Darbari PW-2, Kailaso Bai had informed him immediately on her return that Bhola and the appellant Ramnarayan had assaulted the prosecutrix and taken her with them. In this view of the matter, Kailaso Bai was a material witness who was neither cited nor examined by the prosecution which justifies an adverse inference against the prosecution.

6. If the testimony of Darbari PW-2 and the prosecutrix Shashikala PW-1 is to be believed, Darbari PW-2 had knowledge on 01-06-1995 itself that his daughter had been taken away by Bhola with the assistance of the appellant-Ramnarayan who had threatened his daughter with a *Tangia*. Shivbalak PW-7 has in para-5 of his testimony admitted that quarrel was going on between father of the appellant and Darbari PW-2 and criminal prosecutions were also filed against the father of the appellant Ramnarayan in which he was acquitted. If this was the relationship, Darbari PW-2 would not have waited for 22 days for lodging the F.I.R. against the appellant-Ramnarayan and as a natural human conduct, Darbari PW-2 would have promptly lodged the F.I.R. It therefore cannot be ruled out that after finding the prosecutrix in Village-Jatasamer with Bhola, while lodging report on 22-06-1995, the appellant Ramnarayan was

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implicated falsely. The testimony of defence witnesses Lalla Ram DW-1 and Bandhan DW-2 relating to animosity between father of the prosecutrix and the appellant also creates a strong suspicion regarding complicity of the appellant Ramnarayan in the offence of kidnapping alleged to have been committed by Bhola.

7. The testimony of Shashikala PW-1 does not show that the appellant Ramnarayan had threatened to assault her with a *Tangia*. Her testimony also does not show that the appellant Ramnarayan had assaulted her in any manner. In para-11 of her testimony, the prosecutrix admitted that the appellant-Ramnarayan was not with her when she went with Bhola towards Village-Pandripani-Makarbandha, Her testimony that the appellant-Ramnarayan returned from Chatidand forest therefore does not inspire confidence.

8. From the above discussion, the following points emerge:-

(a) There is no satisfactory explanation as to why Darbari PW-2 did not lodge F.I.R. against the appellant immediately on learning about the occurrence from kailaso Bai.

(b) An adverse inference is drawn against the prosecution for not citing and examining a material witness i.e. Kailaso Bai.

(c) The testimony of Shivbalak PW-7, Lalla Ram DW-1 & Bandhan DW-2 does not rule out the possibility that the appellant Ramnarayana was falsely implicated in the offence alleged to have been committed by Bhola.

9. Having thus considered the evidence led by the prosecution in its entirety, it is clear that the prosecution has failed to establish the guilt of the appellant Ramnarayan under Section-363 of IPC beyond doubt. The possibility that he has been falsely implicated cannot be ruled out.

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10. In the result, this appeal is allowed. Conviction of the appellant Ramnarayana under Section-363 of IPC and the sentence awarded thereunder by the learned trial Judge are set aside. The appellant is acquitted after giving him the benefit of doubt. Record of Sessions Trial No.19/1999 be sent expeditiously to the trial Court for conducting trial against Bhola who is reported to have been arrested on 07-12-2005. The trial Court will consider to exercise its discretion to examine Kailasa Bai as a Court witness, if not examined by the prosecution.

Sd/-
Dilip Raosaheb Deshmukh
Judge